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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CITY OF SCRANTON, et al.,

Appellants,

against

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR CITY OF SCRANTON, ET AL.

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November 30, 1966.

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BRIEF FOR CITY OF SCRANTON, ET AL.

Opinion Below

The opinions of the district court are not yet reported, but are printed as Appendix A to the jurisdictional statement in No. 642, *Baltimore and Ohio Railroad Company, et al.* v. *United States.*

The opinions of the Interstate Commerce Commission (Commission) are reported at 327 I.C.C. 475 and 328 I.C.C. 304.

Jurisdiction

The judgment of the district court denying an interlocutory injunction was entered on October 4, 1966. Notice of Appeal was filed on October 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b).

Questions Presented

The denial of an interlocutory injunction by the district court presents the following questions:

1. Whether the District Court abused its discretion in denying the various requests for issuance of an interlocutory injunction?

2. Whether the District Court erred in sustaining the order of the Interstate Commerce Commission authorizing the merger?

The two questions above presented fairly comprise the subsidiary questions noted in the notice of appeal filed with the district court on October 28, 1966, and contained in the jurisdictional statement filed contemporaneously with this brief pursuant to the per curiam opinion of this Court on October 18, 1966.

Statutes Involved

The National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901 and 1001), Section 5(2) and 5a of the Interstate Commerce Act (49 U.S.C. 5(2) and 5b), and Sections 7, 8 and 10 of the Administrative Procedure Act (5 U.S.C. 1006, 1007 and 1009).

Statement

The proposed merger of Pennsylvania Railroad Company (PRR) and New York Central Railroad Company (NYC) would amalgamate over $6 billion in railroad, industrial and real estate assets. It would constitute the largest merger in U.S. corporate history.

The Eastern District is presently composed of four major railroad systems, each remarkably balanced in competitive power. These four systems, in addition to PRR and NYC, are Chesapeake & Ohio-Baltimore & Ohio (C&O-B&O) and Norfolk & Western Railway (N&W). The proposed merger of PRR and NYC, which would thereupon

control approximately 50 percent of the business between the present four systems, has triggered two additional merger proposals before the Commission. One, denominated Finance Docket No. 21510, is the so-called N&W Inclusion Case in which Erie-Lackawanna Railroad Company (E-L), The Delaware & Hudson Railroad Corporation (D&H) and Boston & Maine Corporation (B&M) seek to force their way into N&W so as to escape the destruction found awaiting them by the PRR-NYC merger. The other proceeding, denominated Finance Docket No. 23832, is the so-called N&W-C&O merger in which these two carriers seek to merge so as to create a competitive system equal in size to the proposed PRR-NYC system.

Hearings have not commenced in the N&W-C&O merger, so that the plan of operation is unknown. However, the plan of PRR-NYC and N&W Inclusion are public knowledge. Both mergers contemplate a drastic reduction in railroad capacity. The majority opinion of the district court, in approving the PRR-NYC merger, also predicts that the Commission will find that the N&W Inclusion is in the public interest and that a final determination in 1967 should be feasible. (No. 642, J.S. A-10, fn. 4).

The plan for the PRR-NYC merger as approved by the Commission contemplates a decline in combined PRR and NYC traffic from 89.2 billion ton miles in 1965 to 64 or 71 billion ton miles in the year 1970. (327 I.C.C. 475, 559) The reduction in railroad capacity to conform with this anticipated lower level of business is the basis for the estimated pre-tax savings of $80 million per annum eight years after consummation of the merger. Since PRR and NYC operate parallel to each other, the operating plan for the merged system is to divert PRR through freight traffic from its main line across Pennsylvania to the so-called water-level route of NYC across the State of New York.

The PRR-NYC merger will result in the elimination of one-third of PRR freight train miles. PRR traffic originating or terminating west of Youngstown and Columbus,

Ohio, on the one hand, and north and east of Linden, N. J., on the other hand, will be diverted from the PRR main line through Pennsylvania and New Jersey, and transferred to the NYC tracks via Buffalo, Syracuse and Albany to the New York City and New England areas.

The drastic curtailment of railroad capacity is contrary to the only probative economic projections of record, which show that the demand for transportation by PRR and NYC will be 105 billion ton miles in 1970, rather than the 64 billion or 71 billion forecast by the Commission. (J.A., A2-A4; B10-B18; Charts 8 and 10).

The order of the Commission approving the merger was made public April 27, 1966. However, the Commission did not release its report on reconsideration until almost immediately prior to the September 21, 1966 hearing before the district court that had been scheduled well in advance. This action of the Commission excluded numerous communities from participation in the District Court proceedings. Nevertheless, two Pennsylvania communities and six New Jersey communities did intervene in the proceedings before the district court and submitted briefs on the due date set by the district court.

Appellants herein, City of Scranton and Township of Weehawken, challenge the fundamental basis for the merger. Although raising serious questions as to the validity of the Commission's orders in the district court, their arguments were dismissed summarily by a single sentence.

The eight Pennsylvania and New Jersey communities timely filed an application for stay of the consummation of the merger with this Court. On October 18, 1966 in a per curiam opinion, this Court established expedited procedures for hearing appeals from the denial of an interlocutory injunction by the district court. The time schedule provided does not permit the submission of an extensive brief to this Court by appellants herein. In accordance with the terms of the October 18, 1966 per curiam order, relevant portions of the pleadings submitted in the district court

are contained in a Joint Appendix to this brief. The Joint Appendix is essential to a full understanding of the arguments advanced by appellants.

Argument

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING AN INTERLOCUTORY INJUNCTION.

The majority opinion of the district court accepted as a correct formulation of the standards governing the exercise of its discretion the four criteria of the Court of Appeals of the District of Columbia in *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F. 2d 921 (1958) (No. 642, J.S. A-16) The cited case has not, however, been adopted or even referred to by this Court in any opinion. The four criteria of the Court of Appeals for the District of Columbia are severe standards under which very few interlocutory injunctions could be granted. The memorandum of the New Jersey communities before the district court highlighted the difference in the factual situation between *Virginia Petroleum Jobbers Assn.*, and the PRR-NYC merger proceedings. (J.A., C5-C6)

The opinion of this Court in *Mayo* v. *Lakeland Highlands Can. Co.*, 309 U.S. 310, 316-17 (1940), mentioned in Rule 15(g) of this Court, indicates that the governing factor for an interlocutory injunction is whether the complaints raise serious and substantial questions as to the validity of the Commission's orders. Accordingly, the district court abused its discretion by applying incorrect standards in denying the various requests for an interlocutory injunction.

There can be no questioning the fact that numerous communities, including appellants herein, will suffer irreparable injury by the merger. This injury was found to be real by the hearing examiners and by the Commission, although erroneously dismissed from consideration as a

matter of law in passing upon the transaction. (327 I.C.C. 475, 481-82; Rec. Rep., pp. 280-83) The injury is also irreparable because appellants are entitled to effective judicial review. This judicial review of the Commission's order would be foreclosed as a practical matter in as much as it would appear virtually impossible to restore the status quo if appellants were to prevail on the merits.

This Court in its October 18, 1966 per curiam opinion held that the district court had in fact sustained the Commission's order authorizing the merger. The abuse of the district court's discretion thus hinges upon whether there are any substantial errors in the Commission's order, because the district court gave its blanket approval of the agency action with respect to the matters raised by Shapp and appellants herein.

This brief and the Joint Appendix are directed to the proposition that the Commission erred as a matter of law in approving the merger and that the district court correspondingly abused its discretion in denying an interlocutory injunction.

II. THE DISTRICT COURT ERRED IN SUSTAINING THE COMMISSON'S APPROVAL OF THE MERGER.

The district court erred in sustaining the Commission's approval of the merger because the two reports of the Commission contain serious errors of law which on their face require that the orders of the agency be annulled outright, or at the minimum the cause be remanded to the Commission. A more complete description of these errors is contained in the Jurisdictional Statement and in the Joint Appendix to this brief, the latter consisting of relevant pleadings in the district court. Some of the major errors are summarized below:

A. *Erroneous Traffic Projections.*

The order of the Commission must be set aside be-

cause the merger is predicated upon adverse U.S. economic developments which, if they did not approximate calamity, would at least violate the forecasts of most accredited economists, mark the failure of all relevant national economic policies, and be highly injurious to our domestic and international needs.

The proposed merger is founded upon economic forecasts which are demonstrably incorrect and shockingly wrong. The economic health of the United States and its military commitments are endangered by this proposed vast amalgamation which would collapse railroad capacity in the industrial heartland of America.

The errors of the Commission with respect to prospective traffic and financial conditions are so outstanding in magnitude and so perverse as to be arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence, as to come within the prohibitions of Section 10(e) of the Administrative Procedure Act. (5 U.S.C. Section 1009(e))

It would be unduly repetitious to again set forth the challenge to the Commission's orders on these grounds. The Court is referred to the Joint Appendix and, in particular, to (1) the brief of the Pennsylvania communities, A2-A4, A6-A12, (2) the oral argument of Leon H. Keyserling before the Interstate Commerce Commission, B1-B36, Charts, (3) petition of Milton J. Shapp dated July 11, 1966 at pp. 8-10, 64-74, and (4) brief of Milton J. Shapp before the district court, D7-D8, D12-D13.

B. *Impact of the Merger Upon Communities*

The hearing examiners concluded that the adverse effect of the proposed merger upon communities with respect to employment and taxation, and upon businesses located therein could not be considered by the Commission. Thus, in the lengthy section of their report entitled, "Effect on Specific Areas, States and Communities," the fol-

lowing is stated in disposing of the adverse impact upon communities:

> "In arguing that the merger should be denied on these bases and requesting the specified condition be imposed on such grounds, we believe that these parties have failed to recognize the nature of the statutory limitations imposed upon the Commission's regulatory power."
>
> "Treated from a regulatory standpoint, and viewed in light of our basic authority as circumscribed by law, we find no foundation to consider such arguments and proposals in determining whether the merger is or is not in the public interest." (Rec. Rep., p. 281)
>
> "The Interstate Commerce Commission, while having broad jurisdiction in the regulation of railroads generally, is confined by its statutory authority in considering "the public interest" as it applies to the "adequacy of a transportation service," and it has no authority to guarantee a certain level of employment at a particular location not to gauge or consider the effect which disinvestment by railroads at a given point would have upon the taxing structure of particular states, counties, communities, or other political subdivisions."
>
> "It is eminently clear that neither the taxing structure, the level of employment in a given area, nor other arguments running to these essential questions bear any relationship to transportation, nor can we find any provision of the act or in its legislative history that permits us to measure the impact of the proposed merger in relationship to such effects upon economic, political or geographic areas or individual businesses located therein." (Rec. Rep., p. 282)

And finally,

> "Insofar as this Commission is concerned, such effects,

though nonetheless real, have no jurisdictional significance and, in our opinion, any condition whose purpose is to protect such interests cannot be imposed. On this basis, therefore, these arguments need not be considered further, and we so find." (Rec. Rep., p. 283)

The Court is thus faced with a clear-cut legal issue. Are the hundreds of towns and cities opposing this merger to be totally ignored as a matter of law? If they are not to be ignored as a matter of law, then the decision of the Interstate Commerce Commission approving the merger must be set aside.

The above conclusions were adopted by the Commission in its April 6, 1966 report. (327 I.C.C. 475, 481-82) The three Supreme Court cases advanced to support the exclusion of vital elements from the "public interest" were all decided prior to 1940. *New York Central Securities Corp.* v. *U.S.*, 287 U.S. 12, 25 (1932); *Texas* v. *United States*, 292 U.S. 522, 531 (1933); *United States* v. *Lowden*, 308 U.S. 225, 230 (1939); (Rec. Rep., p. 282)

Contrary to the legal position of the Commission, the impact of the merger upon communities must be considered. The great purpose of the Interstate Commerce Act is for the protection of individuals and communities. Further, important recent legislation affecting transportation contains declarations of national policy concerning employment and the rehabilitation of depressed areas. For example, Employment Act of 1946 (15 U.S.C. 1021), Area Redevelopment Act of 1961 (42 U.S.C. 2501), Manpower Development and Training Act of 1962 (42 U.S.C. 2571), Economic Opportunity Act of 1964 (42 U.S.C. 2701) and Appalachian Regional Development Act of 1965 (40 U.S.C. App. 2).

The issue does not come before this Court as one of the proper weight to be attached the impact of the proposed merger upon communities. Rather, it is solely a question whether the Commission may totally ignore the impact

on communities as a matter of law. Appellants submit that the proceedings must be remanded to the Commission on this ground alone. The issue is substantial for there are many communities which will be adversely affected. (Rec. Rep., pp. 229-286). For example, Weehawken derives 30 percent of its tax revenues from NYC properties. Yet the Commission would not evaluate the adverse impact upon Weehawken as one element to be considered in determining whether the merger is in the public interest. (J.A., C3)

C. Inclusion of the New Haven Railroad and the Public Interest.

Although ruling out the adverse impact of the merger upon communities as a consideration to be given weight, the Commission goes to the opposite extreme in giving overwhelming weight to the "public benefit" of assisting the New Haven Railroad. The April 6, 1966 report is quite clear on the prominence given NH:

> "We find that this merger, without complete inclusion of NH, would not be consistent with the public interest, and, accordingly, we will require all the New Haven Railroad to be included in the applicants' transaction." (327 I.C.C. 475, 524)
>
> "Accordingly, we find that inclusion of New Haven's freight and passenger operations in this transaction will be consistent with the public interest, and our approval of the merger is conditioned upon such inclusion." (327 I.C.C. 475, 526-27)

The September 16, 1966 report on reconsideration is even more specific, NH being the real justification advanced for the merger:

> "Absent the applicants' merger we see no solution to the New Haven problem. Certainly, neither of the applicants separately can be required to take over New

Haven's deficit-ridden operations. We are not prepared to take this risk involved in a substantial postponement of consummation of the merger. Moreover, we are not prepared to take the risks which delay of consummation of even 6 or 12 months might entail in providing a solution of the New Haven problem other than liquidation." (328 I.C.C. 304, 312)

The erroneous legal framework for approval of the merger by the Commission, stems from the fact that it is predicated upon the "public interest" as defined by the Transportation Act of 1920 plus a vague "public benefits" test, the latter being prominent in the report on reconsideration. (328 I.C.C. 304, 306, 307, 310, 312)

The Commission's April 6, 1966 report placed primary reliance upon the definition of the public interest found in *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25 (1932), followed in *Texas* v. *United States*, 292 U.S. 522, 531 (1934) and in *United States* v. *Lowden*, 308 U.S. 225, 230 (1939). (327 I.C.C. 475, 494, 505) The Commission stated, 327 I.C.C. at p. 505:

> "If the transportation service likely to result from a proposed transaction will be adequate, economical, efficient, and if applicants will provide appropriate transportation facilities and make the best use of them; the public interest will be served, even if it means some competition will be eliminated. See: *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25 (1932)."

In following the public interest as circumscribed by the 1920 Act, the Commission has disregarded the important amendments made in the law in 1940. The four criteria of the "public interest" in *New York Central Securities Corp.* derive from the transportation policy underlying the 1920 legislation as construed by Justice Brandeis in *New England Divisions Case*, 261 U.S. 184 (1923). These four criteria were replaced in 1940 by a different set of criteria

which now appear in Section 5(2)(c) of the Act. Furthermore, the present four enumerated criteria are only "among others" to be considered. The National Transportation Policy, also part of the 1940 legislation, is superimposed upon all of the provisions of the Act by its express terms. (49 U.S.C. preceding section 1) The NTP includes factors such as labor conditions, national defense and the postal service.

The NTP is now the Commission's guide to the public interest. The Interstate Commerce Act and other legislation dealing specifically with transportation problems constitute the immediate frame of reference within which the Commission operates, and the policies expressed therein will be the basic determinants of its action. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-82.

The statutory standards above outlined are important in evaluating the prominence given the NH problem by the Commission as a "public benefit" warranting approval of the merger by the agency. The "public benefits" test is repeatedly mentioned in the September 16, 1966 report of the Commission. (328 I.C.C. 304, 306, 307, 310, 312). However, it is the earlier April 6, 1966 report which gives the legal basis for a broad and undefined "public benefits" standard for the public interest, although such "public benefits" test is not applied in that opinion to any significant degree.

The legal rationale for "public benefits" is shown to derive from *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508, 516 (1923). Yet such a broad general reference to the public welfare was rejected by the Supreme Court in *United States* v. *Lowden*, 308 U.S. 225, 230 (1939). The reference of the Commission to two other opinions of the Supreme Court as lending support to "public benefits" are not supported by the language of the Court itself. (327 I.C.C. 475, 506, 507)

The vice whereby inclusion of NH constitutes a benefit for the merger is readily apparent. This justification for the

merger would fail the *McLean* test because the advantages of a merger must be directed to the overall transportation policy. The railroad passenger problem of NH is subject to express legislation enacted in 1958 to the effect that the passenger deficits are not to be recouped from shippers of freight. *New York, N.H. & H.R. Co., Discontinuance of Trains*, 327 I.C.C. 151, 226-28 (1966); *Southern R. Co.* v. *North Carolina*, 376 U.S. 93 (1964)

The *McLean* test for approval of a merger would consider the criteria of section 5(2), the NTP, and subsequent legislation to determine the overall transportation policy. Inclusion of NH would fail as a relevant criteria because Congress has declared that it is not a "public benefit" to have the burdensome NH passenger deficits passed onto the shipping public. The Court has given considerable weight to other provisions of the Transportation Act of 1958 as affecting the standards by which the Commission's actions are to be judged. *Interstate Commerce Commission* v. *New York, N.H. & H.R. R. Co.*, 372 U.S. 744.

The inconsistencies of the Commission's approach are particularly damaging to communities situated west of the Hudson River, upon whom the Commission concludes that it cannot legally consider the impact of the merger in many significant respects. But east of the Hudson River, the Commission calls upon its own dicta in a 1923 case to hold that a vague "public benefits" is the standard, and that there is no solution to the NH problem absent the merger. This is a bold attempt to have the Appalachian region bail out the passengers travelling on NH.

The Commission errs as a matter of law in following *New York Central Securities Corp., supra*, as modified by *Control of Central Pacific by Southern Pacific, supra*. The applicable standards are to be found in *McLean* as modified by subsequent legislation affecting transportation, which includes the Transportation Act of 1958.

III. APPELLANTS WILL SUFFER IRREPARABLE INJURY UPON CONSUMMATION OF THE MERGER.

City of Scranton is situated in the Commonwealth of Pennsylvania. It is served by E-L, D&H and CNJ. Township of Weehawken is situated in the State of New Jersey. It is served by E-L and NYC. Appellants participated in the proceedings before the Commission and were intervening plaintiffs in the proceedings before the district court.

City of Scranton would be adversely affected by the PRR-NYC merger as a community in the Commonwealth of Pennsylvania, because the plan of merger is to divert PRR traffic now moving through Pennsylvania from such routes in favor of NYC routes via the State of New York. Freight originating or terminating west of Youngstown and Columbus, Ohio, on the one hand, and north and east of Linden, N. J., on the other hand, will be diverted to the water-level route of NYC running from Buffalo, N. Y. to Albany, N. Y. City of Scranton is an integral part of Commonwealth of Pennsylvania, and thus will suffer from the diversion of PRR business and the failure to route maximum traffic across Pennsylvania, even though City of Scranton is not directly served by PRR.

Moreover, City of Scranton will also be injured by the diversion of traffic from the lines of E-L, D&H and CNJ. Although the issue of capital loss indemnity is now before the Commission, such indemnity would only run in favor of E-L and D&H, and not to the communities served by these railroads. Similarly, the traffic protective conditions of Appendix G to the April 6, 1966 report of the Commission are restricted to railroads.

Diversion of traffic from E-L, D&H and CNJ will result in smaller railroad payrolls with the concomitant reduction in bank deposits, retail sales, real estate values, among other things, and adversely affect the business interests in a community. Further, the prosperity of the railroads serv-

ing a community is one of the factors examined by industry in the selection of new plant sites or in the decision to expand or close down existing facilities.

E-L and D&H seek inclusion in the N&W system as a means of escaping destruction from the PRR-NYC merger or, alternatively, their inclusion in the PRR-NYC system itself. Either "solution" is adverse to City of Scranton. Inclusion by merger of E-L and D&H into N&W is believed to mean the abandonment of the present double-track main line of E-L between Scranton and Binghamton, N. Y. and that the double track of E-L from Scranton east to Bells' Bridge will be reduced to single track. The operations of E-L and D&H in the Scranton-Wilkes Barre area also would be coordinated with the resulting loss of desirable competition.

Township of Weehawken will suffer injury as a community served by E-L. In addition, as noted by the hearing examiners, the elimination or curtailment of NYC's railroad properties as proposed would constitute an elimination of substantial tax ratables and receipts, and that NYC facilities constitute 30 percent of all assessable properties in Weehawken. (Rec. Rep., p. 241)

Appellants, as communities located in the Eastern District, will be injured by the contraction of railroad facilities which constitutes the underlying basis for the merger. Transportation capacity must precede economic growth. The budgeting downward of needed railroad facilities by the merger will act as a brake on the entire national economy, the Eastern District, and appellant communities herein.

The district court erred in holding that appellants failed to show irreparable injury.

Conclusion

The judgment should be reversed, and the case remanded with directions to set aside the Commission's orders under review.

Respectfully submitted,

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